entered by it in the 1957 proceedings, respecting which 1957 order stay had been denied by the court below under Sec. 24 (b) of the Holding Company Act (Appendix A-1), despite the pendency of proceedings for review of that 1957 order, and despite the "exclusive jurisdiction" provisions of Sec. 24 (a) of that Act.

4. Whether the SEC could validly exclude from management's proxy material petitioners' duly presented Statement in Opposition to management's proposal to amend Union's charter so as to increase the authorized number of its common shares by 1,500,000 without according the existing common shareholders opportunity to regain unrestricted preemptive subscription rights, such rights having been denied them by charter amendment adopted under **R. S. Mo. 1949, Sec. 351.305** some years ago when Union was a wholly owned subsidiary of North American Co. That Missouri statute provides that such preemptive subscription rights may be limited or denied only by the articles of incorporation.

5. Whether the court below properly interpreted New York Stock Exchange Rules 450, 451 and 452 as requiring, in addition to the formal notice of opposition given that Exchange by petitioners, counter proxy solicitation by petitioners of Union's 60,000 odd stockholders respecting votes in opposition to management's stock increase proposal (which proposal afforded Union's common stockholders no opportunity to regain their preemptive subscription rights by Charter amendment), in order to create a "contest" under said Rules so as to prevent brokers from giving management's proxy agents their proxies to vote, in favor of that proposal, stock held in their names but beneficially owned by others, without having received voting instructions from those beneficial owners, and without having been notified by management of petitioners' opposition to that management proposal.

6. Whether management's proxy ballot, which provides that management's proxy agents will vote in favor of management's stock increase proposal listed thereon, and against petitioners' proposals listed thereon, if the stockholder signing the proxy fails to indicate thereon how his vote should be cast, is valid under Sec. 20 (a) of the Holding Company Act and, if so, whether it is also valid under **R. S. Mo. 1949, Sec. 351.245 (4)** (Appendix A-2).

7. Whether under said Missouri statute, and under Proxy Rule X-14A-4(c), management's proxy agents could lawfully vote against petitioners' proposals referred to in management's notice of meeting, but excluded from management's proxy statement and proxy ballot under Rule X-14A-8(c) by order of the SEC, without any authority conferred on the proxy form executed by the stockholder for those proxy agents to vote against those proposals, which were known to those proxy agents by virtue of their being referred to in the notice of meeting.

8. Whether there is any rationality in the Rule X-14A-8(c) (5) exclusion by the SEC from management's proxy material, on the ground that it consists of a recommendation or request that management take action with respect to a matter relating to the conduct of the ordinary business operations of the company, of a By-Law proposed by petitioners banning false advertising and false communications to the stockholders and the expenditure of any company money for either of those purposes, in view of the provisions of **R. S. Mo. 1949, Sec. 351.290** (Appendix A-2), which vest in the stockholders the power to make any By-Laws for the regulation and management of the affairs of the corporation, and in view of the provision of **R. S. Mo. 1949, Sec. 351.385 (11)** (Appendix A-2) that the validity of By-Laws of Missouri corporations adopted for the administration and regulation of the affairs of the corporation is determined by Missouri law?

STATUTES INVOLVED.

Sec. 24 (a) and (b) of the Public Utility Holding Company Act of 1935, **15 U. S. C. 79x**, and part of **R. S. Mo. 1949, Sec. 351.245 (4)**, all of **Sec. 351.290** and all of **Sec. 351.385 (11)**, are involved and are set forth in Appendix A-2. Secs. 1 (a) and 20 (a) of said Holding Company Act, Sec. 45 (a) of the Federal Trade Commission Act, **15 U. S. C. 45 (a)**, and **R. S. Mo. 1949, Secs. 351.240, 351.225 (2), 351.230, 351.305** and **561.660** are also involved.

STATEMENT.[1]

This case is the second of a trilogy brought by petitioners to review SEC orders permitting to become effective declarations of proxy material submitted to the SEC by the management of Union. The first, Case No. 15,765 below, was brought in 1957. It was held moot. See **Dyer v. SEC (CA 8, 1958), 251 F. 2d 512.** This court, on May 18, 1959, in its Case No. 67, October 1958 Term, granted certiorari in that case, vacated that judgment, and remanded that Case No. 15,765 to the court below for further consideration in the light of that court's April 10, 1959 decision of unmootness rendered in the instant case, Case No. 15,989. See **Dyer v. SEC (1959), 3 L. Ed. 2d 976.** A decision on the merits in that remanded Case No. 15,765 is pending below.

In the meanwhile, on April 3, 1959 petitioners filed their third case below, seeking review of an SEC order of March 27, 1959 permitting to become effective the declaration of Union's management respecting its 1959 proxy material. That third case, being Case No. 16,205, is likewise pend-

[1] Note: This is not a statement of the entire case. It is a statement of only that part of the case essential to consideration of this petition for certiorari.

ing below. The petition therein is Item 25 of the record herein.[2]

In each of these three cases stays were applied for when the petitions were filed, and in each stay was denied.

This case, like that considered by this court in its October, 1958, Term Case No. 67, arose out of allegedly false advertising and false communications to the stockholders on the part of Union's management. Reference is made to petitioners' Statement in their petition for a writ of certiorari in that case. This case is but a continuation of that, with more false communications and SEC Rule violations added in.

Here, on October 25, 1957 (Item 9, Doc. 7), the SEC entered an order prohibiting all persons from soliciting proxies for use at the April 21, 1958 annual meeting of Union's stockholders unless pursuant to a declaration permitted by the SEC to become effective. Union's management filed such a declaration on January 31, 1958 (Item 9, Doc. 1). On February 13, 1958 it filed its Amendment No. 1 (Item 9, Doc. 2).

Petitioners, being common stockholders of Union, had on January 7, 1958 submitted ten proposals to Union under SEC Proxy Rule X-14A-8 (a), together with their not-

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[2] Note: Under the May 9, 1958 order of the court below (Item 12 of the record herein) this case was heard on the original record, without need to print. No printed record was filed. The SEC's transcript of record (Item 9) contains the evidence taken and rulings made at the March 6, 7, 1958 evidentiary hearing before the SEC Hearing Examiner, the various exhibits offered and introduced thereat, and such other material as the SEC certified it considered when the orders complained of were entered. Each document comprising that SEC record is referred to by number in the SEC's certificate, covering its said record. The transcript of the March 6, 7, 1958 evidentiary hearing herein is Doc. 35. That hearing transcript is Doc. 35 of Item 9 of the record herein.

All record references here are by Item No. Thus, a particular exhibit offered at the evidentiary hearing would be referred to as Item 9, Doc. 40, or whatever the Doc. No. was.

more-than 100 word Statements in Support thereof under Rule X-14A-8 (b). Under date of February 17, 1958 they submitted another proposal under that Rule, together with their not-more-than 100 word Statement in Support.

All of petitioners' eleven proposals were noted in management's amended notice of meeting (Item 9, Doc. 5, Ex. 1-a, p. 1), but only four were carried in management's final proxy statement and final proxy ballot. Three were excluded on the basis of Rule X-14A-8 (c) (4) (i), i. e., because they received less than 3% of the votes cast thereon at the April 20, 1957 stockholders' meeting. The other four were excluded under Rule X-14A-8 (c) (1) or (5).

Of those other four excluded, petitioners' proposed By-Law banning false advertising and false communications to the stockholders and prohibiting the expenditure of any company money for either of those purposes (Item 9, Doc. 1, Ex. 2, p. 2, Proposal No. 5), was excluded under Rule X-14A-8 (c) (5), i. e., because it was deemed a recommendation or request that management take action with respect to a matter relating to the conduct of the ordinary business operations of the company.

The SEC then issued its February 7, 1958 order (Item 9, Doc. 8), affording all interested persons opportunity to file their objections to management's declaration. Petitioners filed theirs under date of February 19, 1958 (Item 9, Doc. 10). Attached thereto was Exhibit B thereof, their April 22, 1957 protest to the inspectors of election who canvassed the proposal ballots cast at Union's April 20, 22, 1957 stockholders' meeting. That protest challenged the legality of most of the proposal ballots cast by management's proxy agents at that 1957 meeting against petitioners' proposals listed on the proxy ballot, and the legality of all the proposal ballots cast by those proxy agents against petitioners' proposals not listed thereon, but referred to only in the notice of meeting. Petitioners re-

quested those inspectors of election to seek a declaratory judgment. However, despite the oaths they took under **R. S. Mo. 1949, Sec. 351.240**, to act "with strict impartiality," they declined to do so. They were hired by Union's management.

Attached also to petitioners' February 19, 1958 objections was Exhibit C thereof, which was petitioners' proposed Statement in Opposition to management's proposal to amend Union's charter so as to increase the authorized number of shares of the $10 per common stock of the company from 10,500,000 to 12,000,000, i. e., by 1,500,000 shares, without according unrestricted preemptive subscription rights.

That Statement in Opposition (Item 9, Doc. 10, Ex. C), which petitioners stated it was their intention to present to the stockholders at the April 21, 1958 stockholders' meeting when management presented its stock increase proposal, as petitioners did, was in the nature of an alternative proposal. Management wanted stockholder approval of its stock increase proposal without according unrestricted preemptive subscription rights. The Charter had been amended in 1952, when Union was a wholly owned subsidiary of North American Co., so as to restrict those rights to the point of their virtual extinction. Under **R. S. Mo. 1949, Sec. 351.305**, preemptive subscription rights "may be limited or denied to the extent provided in the articles of incorporation." Petitioners objected to the stock increase unless the stockholders were afforded opportunity to remove those 1952 restrictions from the Charter.

To meet some of the other objections petitioners raised in their initial February 19, 1958 protest management then filed its Amendments Nos. 2 and 3 (Item 9, Docs. 3 and 4). Petitioners responded with their supplementary February 26, 1958 objections (Item 9, Doc. 12).[5] In that supplement, as in their initial objections, petitioners pleaded the lack

of jurisdiction of the SEC to pass on any of management's proxy material that was dependent on a finding of validity of the SEC's order of March 21, 1957, which order approved management's 1957 proxy material. That order was then, and still is, on judicial review in Case No. 15,765.

Petitioners also, in their said supplementary objections (Item 9, Doc. 12, p. 8), asked that subpoenas be issued to the directors of Union who were present at the November 16, 1956 Board meeting, naming them, and giving their addresses. Petitioners wanted to be able to test the truth of testimony given by Union's president J. Wesley McAfee at the March 13, 1957 evidentiary hearing before SEC Hearing Examiner James G. Ewell, held as part of the administrative proceedings that gave rise to Case No. 15,765. Mr. McAfee had there testified that at that meeting "no one had indicated any desire to seek proxies" (Tr. of Hearing, p. 153, Case No. 15,765).

Both the SEC's Staff (Item 9, Doc. 13) and Union's management (Item 9, Doc. 14) opposed issuance of those subpoenas. They were not issued.

Under the February 25, 1958 order of the SEC (Item 9, Doc. 11) the March 6, 7, 1958 evidentiary hearing herein was held, in Washington, D. C. Thereafter, on March 17, 1958, before the March 20, 1958 oral argument before the SEC itself was had (Item 9, Doc. 36), petitioner J. Raymond Dyer filed with the SEC his verified request that SEC Commissioners Orrick, Patterson, Hastings and Sargent disqualify themselves, or be disqualified, on the grounds of bias, prejudice and favoritism (Item 9, Doc. 23). Four exhibits were attached to that request, which was in affidavit form, and 23 instances were assigned. One of these (Item 9, Doc. 23, para. 20, p. 8) was that affiant, with just and reasonable cause, believed that said Commissioners had shielded material perjury committed by Union president J. Wesley McAfee at the March 13, 1957 evi-

dentiary hearing on management's 1957 proxy material, and would continue to shield that perjury insofar as they were able. Petitioners' charge of bias, prejudice, partisanship and commitment on the part of those Commissioners was pleaded by petitioners in their petition herein (Item 1, para. 7, p. 3).

On March 18, 1958 that disqualification request was denied by each of said Commissioners, and by the SEC (Item 9, Docs. 24 and 25). The reason assigned was the lack of any valid basis for disqualification. Those Commissioners, in each of the 23 instances assigned, had been but doing their duty, the SEC found.

As to that, at the March 6, 7, 1958 evidentiary hearing petitioners had offered their Exhibit 7 in evidence (Item 9, Doc. 35, p. 168). Exhibit 7 (Item 9, Doc. 47) was a news account published in the May 24, 1957 edition of the St. Louis Post-Dispatch, quoting the U. S. Department of Justice press release of that date issued at the instance of the Department of Justice by U. S. Attorney John B. Stoddart, Jr., at Springfield, Illinois. It covered the results of the joint investigation of the Department of Justice and the SEC respecting Union's 1956 Illinois lobbying venture referred to in Petitioners' Exhibits 5 through 11 hereof (Item 9, Docs. 45-51). That Exhibit 7 was excluded from evidence by the Hearing Examiner without assignment of reason (Item 9, Doc. 35, p. 169).

At that same evidentiary hearing petitioners had also offered their Exhibit 8 in evidence. It was similarly excluded (Item 9, Doc. 35, p. 169). Exhibit 8 (Item 9, Doc. 48) was a letter dated August 19, 1957, addressed to petitioner J. Raymond Dyer by said John B. Stoddart, Jr., stating that "The Department of Justice in Washington and the Securities and Exchange Commission have authorized me to forward to you a copy of the Press Release dated May 24, 1957 issued by our office in connection with

the Union Electric Company at St. Louis, Missouri." A document was attached to that letter, headed "Press Release—May 24, 1957," and marked "Copy" at the foot, under the signature of "John B. Stoddart, Jr., United States Attorney."

Exhibit 8, purportedly a "copy" of the actual press release of May 24, 1957, "authorized" by the SEC, according to U. S. Attorney John B. Stoddart, Jr., to be released to petitioner J. Raymond Dyer, is not a copy. It is a very different document, and far more exculpatory. Gauged by Exhibit 7, the true press release, Petitioners' Exhibits 5, 6, 10 and 11 (Item 9, Docs. 45, 46, 50 and 51), which are advertisements published by Union's management and communications sent out by it to the stockholders, all of which deal with that 1956 Illinois lobbying venture, are all clearly false or misleading, not only in violation of Rule X-14A-9, but also Sec. 45 (a) of the Federal Trade Commission Act (which declares unlawful "unfair or deceptive acts or practices in commerce") and R. S. Mo. 1949, Sec. 561.660, the Missouri False Ad Statute. These Exhibits 5, 6, 10 and 11 were likewise excluded from evidence (Item 9, Doc. 35, p. 169 and p. 185).

Gauged by that same Exhibit 7, the true press release, the March 13, 1957, testimony of Mr. McAfee was clearly false. He had testified (Tr. of Hearing, pgs. 105 and 110, Case No. 15,765) that the advertisements shown by Exhibit 11 here, and the stockholders communication shown by Exhibit 10 here, were substantially true and correct (Tr. of Hearing, pgs. 105, 110, Case No. 15,765).

Exhibit 8, the imperfect "copy", greatly dulled that proof. It contains exonerating statements not contained in Exhibit 7, and does not contain condemnatory statements contained therein. The SEC, according to U. S. Attorney John B. Stoddart, Jr., had "authorized" the change.

Further, as recited in para. 8, p. 3, of the verified request of petitioner J. Raymond Dyer that Commissioners Orrick, Patterson, Hastings and Sargent disqualify themselves or be disqualified (Item 9, Doc. 23), on March 21, 1957, those Commissioners entered an order permitting management's 1957 proxy material to become effective, including, after the passage of five business days unless a hearing thereon was ordered, material filed by management as Post-Effective Amendments. Under that order, according to affiant in Item 9, Doc. 23, and by virtue of the unlawful ex parte contact recited therein made on March 24, 1957, by Union's vice president and general counsel John A. Woodbridge with SEC counsel Joseph S. Mitchell, Jr., in violation of a notice stipulation formally approved by the SEC in its order of March 15, 1957, and over petitioners' formal protest, said Commissioners permitted management's 1957 Post-Effective Amendments Nos. 1 and 2 to become effective for use on March 29, 1957, for management's further solicitation of proxies. Those Post-Effective Amendments, without factual foundation and in violation of Rule X-14A-9, Note (b), and Sec. 45 (a) of the Federal Trade Commission Act, recited that petitioner J. Raymond Dyer was seeking to "gamble", in a "lawyer's game", with an "investment totaling millions of dollars", belonging to "thousands of stockholders", so as to achieve "spoils" that would be "highly lucrative" to him.

To counteract that defamatory canard, on March 29, 1957, as stated in affiant's said affidavit, petitioners filed Case No. 15,765, seeking review of said Commissioners' libel-sanctioning order of March 21, 1957. Thereafter, on the same day, petitioner J. Raymond Dyer, according to his said affidavit, mailed to Union's 60,000 odd stockholders a postcard advising them that petitioners were seeking such review, and that he thought truth would prevail.

For doing that, as recited by affiant Dyer in Item 9, Doc. 23, paras. 10, 11 and 12, pgs. 3, 4, on April 9, 1957,

said Commissioners sought an injunction against him. See **SEC v. Dyer (E. D. Mo. 1958), 22 FRD 229.** As recited in the opinion in that case, on April 23, 1957, immediately after the April 20, 22, 1957, meeting of Union's stockholders had transpired, said Commissioners sought, under Rule 41 (a) (1), F. R. C. P., to dismiss their said malicious prosecution. It had served its purpose. The court below had denied petitioners' stay application in Case No. 15,765, and publicity adverse to petitioner Dyer had been accomplished. All of petitioners' proposals had been snowed under at that stockholders' meeting. Hit and run.

However, at the instance of defendant that Rule 41 (a) (1) notice of dismissal in **SEC v. Dyer** was set aside.

Though said Commissioners Orrick, Patterson, Hastings and Sargent, along with former SEC Chairman J. Sinclair Armstrong, had, by entry of their formal precursive order of March 21, 1957, as well as by the ex parte approval given by their attorney Joseph S. Mitchell, Jr., permitted management's Post-Effective Amendments Nos. 1 and 2 to become effective, management did not send out to the stockholders its scheduled March 29, 1957, defamatory letter. As stated by affiant in Item 9, Doc. 23, para. 9, p. 3, under date of March 23, 1957, petitioner J. Raymond Dyer wrote Mr. McAfee that if he sent it out he and the company would be sued in libel. So, likewise would have been each of said Commissioners. The entire defamatory project was abandoned and instead said Commissioners resorted to their said malicious prosecution, and to abuse of process as hereinafter recited.

There are other bases stated in Item 9, Doc. 23 for the disqualification of Commissioners Orrick, Patterson, Hastings and Sargent. They withheld, from May 6, 1957 until September 25, 1957, after petitioners' August 20, 1957 brief had been filed, inclusion of six of petitioners' exhibits in their transcript of the record in Case No. 15,765. Two of those exhibits, 11 and 21, were particularly perti-

nent to petitioners' proof that Mr. McAfee's March 13, 1957 testimony was false. Exhibit 11 showed that the report released to St. Louis press respecting Union's 1956 Illinois lobbying venture, which was read only locally, by those who already knew the score, differed in material respects from the report of that venture sent to the stockholders, who resided all over the world. The report sent the stockholders was considerably more exculpatory. Said Commissioners approved the exclusion of that Exhibit 11 from evidence, thereby preventing comparison.

Said Commissioners likewise approved the exclusions from evidence of said Exhibit 21. It was a news account carried on the front page of the November 23, 1956 edition of the St. Louis Post-Dispatch headed "BAR'S OK FALSELY CLAIMED FOR UNION ELECTRIC'S BILL". The body of the story quoted the minutes of meeting of a committee of the Chicago Bar Association, at which Union's counsel Henry F. Driemeyer was present, and at which the Illinois bill later lobbied was turned down. Mr. McAfee vouched for the truth of that news account. He testified: "The body of the story was quite accurate" (Tr. of Hearing, p. 120, Case No. 15,765), though he said "I never saw headlines that were less informative, or accurate, than those were" (Id.) The offers of proof herein so show.

Exhibit 10 here (Item 9, Doc. 50), Mr. McAfee's November 19, 1956 communication to the stockholders respecting that 1955 Illinois lobbying venture, states that that bill had the support of the Illinois and Chicago Bar Associations. It was that November 19, 1956 communication to the stockholders, and also Exhibit 11 here (Item 9, Doc. 51), the two-page advertisements of November 18, 1956 which state the same thing, that Mr. McAfee twice testified, on March 13, 1957, were substantially true and correct (Tr. of Hearing, pp. 105 and 110, Case No. 15,765). The offers of proof herein so show.

Said Commissioners likewise omitted from their transcript in Case No. 15,765 petitioners' objections to Amendment No. 4 of management's declaration, which was a highly prejudicial statement, and all of management's Post-Effective Amendments and petitioners' objections thereto. They are in petitioners' supplemental record in that case, which the court below permitted petitioners to file.

Though they certified to the court below that their March 21, 1957 order in Case No. 15,765 was based on their Findings and Opinion in that case, said Commissioners held up issuing their Findings and Opinion until April 17, 1957, thereby prejudicing the grant of petitioners' application for a stay. On the day that stay application in Case No. 15,765 was argued, April 8, 1957, said Commissioners, with all the power and prestige of the Government behind them, filed with the court hearing that stay application their motion to dismiss, not the stay application, but the petition for review, alleging that petitioners were not "entitled" to review under the Act; that their petition was "frivolous"; was "filed solely for delay"; and that it contained "impertinent and scandalous allegations unsupported by the record". Though that motion was never passed on, it had its effect. As was intended, the press took it up. The court below did dismiss the petition, though on the ground of mootness rather than the grounds said Commissioners assigned, so the result they sought was achieved. Except for the action of this court in Case No. 15,765 said Commissioners would have accomplished the purpose of their abuse of process in that case.

In the judgment below the petition here was likewise dismissed (Appendix B-2). In the opinion below (Appendix B-1) the court held that there was "not the slightest basis in the record" for petitioners' charge (Item 1, paras. 5 and 7, pp. 1, 2) that Commissioners Orrick, Patterson, Hastings and Sargent were biased and prejudiced. The record show-

ing is contained in petitioner J. Raymond Dyer's said affidavit, Item 9, Doc. 23, and in the exhibits petitioners offered in evidence, which were excluded. No answering affidavit was ever filed by Commissioners Orrick, Patterson, Hastings or Sargent.

Following the evidentiary hearing herein, and the filing by petitioners and the SEC Staff of their respective recommended Findings (Item 9, Docs. 21 and 22), petitioners filed their exceptions to the Staff's recommended Findings, with supporting brief (Item 9, Doc. 31). Then, on March 20, 1958, oral argument was had (Item 9, Doc. 36). The next day petitioners filed their reply to the oral argument Union had made (Union had recommended no Findings and had filed no exceptions or brief), together with a copy of a letter petitioners had sent the New York Stock Exchange announcing the existence of a contest over management's stock increase proposal (Item 9, Doc. 34). That reply, with that copy of that letter attached, at the request of petitioners was treated by the SEC as a motion for rehearing.

The SEC then issued its March 21, 1958 Findings and Opinion (Item 9, Doc. 53; Appendix A-3) and entered its contingent order of that date (Item 9, Doc. 53, Part 2; Appendix A-4). Then, on March 24, 1958, management filed its telegraphic Amendment No. 5 to its declaration (Item 9, Doc. 6). On that same date petitioners forwarded to the SEC their airmail letter protest thereto (Item 10, Doc. 34a), followed by their airmail formal protest of the next day (Item 10, Doc. 34b). Those protests were based on Rule X-14A-9. Amendment No. 5 was deceptive, petitioners contended.

In the meanwhile, however, the SEC had entered its final order of March 25, 1958 (Item 9, Doc. 54; Appendix

A-5). In that order petitioners' motion for rehearing was denied. Their protest against Amendment No. 5 was never considered. No opportunity to be heard was accorded on that.

After the petition below was filed on April 4, 1958 Union was granted leave to intervene as a respondent (Item 4) and Mr. Day was granted leave to intervene as a petitioner (Item 12). Each was allowed to file a separate brief, and each did. Stay was denied as aforesaid (Item 8) and the April 21, 22, 1958 stockholders' meeting was held. At that meeting petitioners submitted to the stockholders for their action all eleven of their proposals (Item 24), and likewise protested the adoption of management's stock increase proposal unless preemptive subscription rights were accorded the common stockholders. The proposal vote at that meeting was as shown in Item 24. All of petitioners' proposals were decisively defeated, and management's stock increase proposal, without according preemptive rights, was overwhelmingly carried.

Then, on July 10, 1958, petitioner J. Raymond Dyer filed his and his employee's affidavits respecting the proposal votes cast by management's proxy agents at that meeting. In his affidavit (Item 13) affiant Dyer stated that out of the 9,189,372 proposal votes cast at that meeting proxy ballots representing 5,470,125 shares voted by management's proxy agents were blank, i. e. though signed, they were not checked as to any of the proposals listed thereon, whether management's or petitioners'.

Affiant Dyer's affidavit also shows that all those unmarked proxies were voted by management's proxy agents in favor of management's proposal to increase the authorized common stock without according preemptive rights, and against petitioners' four listed proposals, and likewise against petitioners' seven proposals that were not listed on the proxy ballot or recited in the proxy state-

ment, but that were referred to in the notice of meeting. Affiant stated that his survey showed that management's unmarked proxy ballots constituted 59.5% of the proposal vote cast, and over half of the total number of shares or votes outstanding. Without them, affiant Dyer stated, under Missouri law there would have been no quorum.

On the question of Mr. McAfee's disqualification, at the evidentiary hearing petitioners sought (Item 9, Doc. 35, p. 152) to examine him "respecting things that went out over his signature to the stockholders". Petitioners stated they wanted to examine him "as to their falsity or truth" (Item 9, Doc. 35, p. 181). They were not allowed to. Those "things" were Petitioners' Exhibits 5, 6, 10, 11 and 13 (Item 9, Docs. 45, 46, 50, 51 and 52). They were all excluded from evidence by the Hearing Examiner. Exceptions were taken and offers of proof were made.

Petitioners also sought at the evidentiary hearing "to examine Mr. McAfee respecting the testimony he gave on March 13, 1957, having to do with the 1957 proxy material, that was heard before Hearing Officer Ewell". Petitioners stated that "that testimony given was false" (Item 9, Doc. 35, p. 187). On objection by the SEC Staff the Hearing Examiner held that petitioners' proposed inquiry was not "germane", and excluded it (Item 9, Doc. 35, p. 188). Exceptions were taken and offers of proof were made.

In its Findings and Opinion (Appendix A-3) the SEC upheld those rulings of the Hearing Examiner. It found that Petitioners' Exhibits 5, 6, 7, 8, 9, 10, 11 and 13 (Item 9, Docs. 45-52) were all "too remote"; that whether or not they contained false or misleading statements was "not an issue"; and that as for petitioners' "requests for the issuance of subpoenas", and their "offer of proof concerning the accuracy of certain testimony of Union's president

in the hearings with respect to management's proxy material for the 1957 meeting of stockholders", the present proceedings were "not a proper forum for the raising of this matter", since "the accuracy of such testimony is not an issue herein".

The court below affirmed generally that SEC Finding. Petitioners had cited to it, in a separate brief (Item 18), the applicable authorities on disqualification, based on **WKAT, Inc. v. FCC (C. A. D. C., 1958), 258 F. 2d 413.** They cited the same authorities to this court in its Case No. 67, October 1958 Term.

On the jurisdictional point, the SEC completely ignored petitioners' contention (Item 9, Docs. 10, 12 and 21) that "exclusive jurisdiction" over the order of March 21, 1957 lay with the court reviewing that order, under Sec. 24 (a) of the Holding Company Act (Appendix A-1). It permitted management's exclusion from its proxy material, on the basis of that order, of three of petitioners' proposals under Rule X-14A-8 (c) (4) (i), i. e. on the ground that they received less than 3% of the 1957 vote. The lower court, though a court of review and not a court of re-trial **(Pet Milk Co. v. Boland (C. A. 8, 1949), 175 F. 2d 151, 159),** answered that jurisdictional argument. In so doing it ignored the principle that, to be valid, administrative rulings must show their own factual basis or legal reasoning, which may not be supplied by the reviewing court.

The reasoning supplied by the lower court was that the March 21, 1957 order had "legal operation", despite the fact that review proceedings respecting it were pending (they are still pending), since petitioners' application for a stay therein had been denied, and that hence the SEC's "treatment of the situation here was valid and proper administrative action".

It was on its pure assumption of jurisdiction, without assignment of reason and over petitioners' protest, that the SEC not only excluded these three proposals, but also rested many of its other Findings. It simply presumed its March 21, 1957 order to be valid, and followed it, even though it was on review and even though the reviewing court had "exclusive jurisdiction" to affirm it.

In that connection, the failure of the SEC to rule specifically on the exclusion of Petitioners' Exhibit 12 (Item 9, Doc. 43) is significant. That exhibit, offered as a proposed insertion in management's proxy statement, and admitted in evidence, simply recited the then existing status of the review proceedings respecting the SEC's 1957 order. It had two purposes; to inform the stockholders and to supply the factual basis for petitioners' jurisdictional contention. It stated that petitioners, on March 29, 1957, had instituted review proceedings respecting that 1957 order; that the court below had held them moot and had denied petitioners' petition for rehearing; and that petitioners had moved for a stay of judgment, which motion was then pending, "so as to permit them to petition the Supreme Court of the United States to review the order dismissing their petition on the ground of mootness".

At the evidentiary hearing Mr. McAfee had admitted that he had advised some of the stockholders respecting those review proceedings (Item 9, Doc. 35, pgs. 206-209). He testified that Case No. 15,765 had been "decided in the company's favor" (Item 9, Doc. 35, pgs. 209-210). Petitioners felt that all the stockholders should be informed as to the status of that case, and informed truthfully, not falsely. But petitioners' primary reason for offering their Exhibit 12 was to supply to the SEC the factual basis for their legal contention that under Sec. 24 (a) of the Holding Company Act the reviewing court, not the SEC, had juris-

diction over the 1957 order. They did not want to risk the SEC not taking judicial notice of the fact that its 1957 order was on review.

In its Findings and Opinion the SEC stated that it had considered petitioners' objection to the exclusion of this Exhibit 12 along with petitioners' "other objections", and found it, along with them, "without merit". The court below affirmed that general finding generally.

As regards the exclusion from management's proxy material of petitioners' Statement in Opposition (Item 9, Doc. 10, Ex. C) to management's stock increase proposal, the SEC found (Appendix A-3) that the "proxy rules contain no provision requiring management to include such opposition statements by stockholders in its own proxy material, and no special circumstances have been shown to justify making an exception in this case". It departed from its usual policy of requiring full disclosure, and ignored the fact that under Rule X-14A-9 the omission from the proxy material of a statement respecting petitioners' declared intention to oppose management's proposal at the stockholders' meeting unless preemptive subscription rights were accorded was essential if that proxy material was to be kept "not false or misleading". See petition for rehearing, Item 22, p. 6. It was enough for the SEC that management "strenuously" objected to the inclusion in its proxy material of petitioners' Statement in Opposition (Item 9, Doc. 35, p. 104). It approved the exclusion.

Though petitioners cited the authorities to the court below in a separate brief (Item 19), based on a Note in **46 Mich. L. R. 1111** they came across after their main brief and reply briefs had been submitted, the lower court affirmed that exclusory ruling of the SEC, and (Item 23) denied the petition for rehearing wherein the court's pos-

sible oversight of that Note and **Berkwitz v. Humphrey (N. D. Ohio 1958) 163 F. Supp 78** was extensively dealt with (Item 22, pgs. 3-7).

At the evidentiary hearing the SEC Staff introduced in evidence a copy of New York Stock Exchange Rules 450, 451 and 452 (Item 9, Doc. 37). The letter with which management proposed to supply brokers in whose names Union's stock was held for beneficial owners, for transmittal by those brokers to their beneficial owners, recited (Item 9, Doc. 3, Ex. 10-a) that under those Rules the broker could not vote the beneficial owner's shares on petitioners' proposals without the beneficial owner's instructions how to do so. That was because there was a "contest" respecting those proposals under those Rules. The broker-letter management proposed to send out did not say the same as regards management's proposal, and instead stated that if the beneficial owner gave no instructions the broker would vote the beneficial owner's stock "as recommended by the management", i.e. in favor of management's stock increase proposal sans preemptive subscription rights, and further, that if no word from the beneficial owner was received by the broker by "the 10th day before the meeting" the broker would furnish management with a proxy in favor of management's proposal.

Petitioners objected to that broker-letter in their recommended Findings (Item 9, Doc. 21, paras. 12 and 13, p. 4) and in their exceptions and supporting brief re the Staff's recommended Findings (Item 9, Doc. 31, para. 10, p. 7), on the ground of discrimination. Petitioners contended that if there was a "contest" over petitioners' proposals under those Stock Exchange Rules there was likewise a "contest" over management's.

In its Findings and Opinion (Appendix A-3) the SEC held to the contrary, stating that management's proposed

broker-letter was "in accordance with the rules of the New York Stock Exchange". Brokers could deliver proxies to management's proxy agents calling for the vote of their clients' stock "For" or "Against" petitioners' proposals only if those brokers were so instructed by their beneficial owners, but they could freely deliver proxies calling for a vote in favor of management's proposal, though in receipt of no instructions on that, whether by reason of the beneficial owner's failure to check the proxy authorization card (Item 9, Doc. 3, Ex. 10-a, p. 2), or by reason of his failure to furnish the broker with a duly signed proxy authorization card "by the 10th day before the meeting".

In a nutshell, by finding that management's proposed broker-letter was "in accord" with New York Stock Exchange Rules 450-452, the SEC found that petitioners' proposals were "in contest", but that management's was not. To put that another way, the SEC found that if management opposes a stockholder proposal there is a "contest" under the Stock Exchange Rules, but that if a stockholder opposes a management proposal there is not.

The court below affirmed that SEC interpretation of the New York Stock Exchange Rules. After reciting that the "record shows that there were approximately 4,000,000 shares" of Union Electric which were broker-held" (and that is nearly 37% of the outstanding stock), the court below held that for there to be a "contest" in the sense used in the Stock Exchange Rules there must be a countersolicitation. Otherwise, the court reasoned, by notifying the Exchange that there was a "contest" respecting management's proposal, as petitioners did here (Item 9, Doc. 34), any stockholder could disenfranchize the beneficial owners of broker-held stock respecting any management proposal.

Actually, only those who neglected to instruct their broker respecting management's proposal would be so

disenfranchized, as those who failed to instruct their broker respecting the vote to be cast on petitioners' proposals were disenfranchized here. The disenfranchizement would be of their own doing. They could vote whichever way they wanted, but if they did not vote their broker could not vote for them without instructions.

If countersolicitation is necessary to make an actual contest a "contest" under the Stock Exchange Rules, only the rich can afford it. What management called a "lawyer's game" the SEC and the court below have made a "rich man's game". Countersolicitation of 60,000 odd stockholders takes considerable time and costs considerable money. First you have to get SEC approval. And then you have to get the stock list. In a controversial situation that usually means a lawsuit. Even then such law suits are not always successful. See **State ex rel. Nancy Corinne Dyer v. Union Electric Co. et al. (St. L. App. 1958), 309 S. W. 2d 649.** Considering the time and money elements it is utterly impracticable, if not completely impossible, for the average stockholder in a widely held company to create a "contest" over a management proposal by countersolicitation.

In effect, what the SEC found, and the court below affirmed, was that one letter to the New York Stock Exchange does not suffice to create a "contest". 60,000 odd countersolicitation letters to petitioners' fellow stockholders are necessary. Large sums must be expended to prevent nearly 37% of the outstanding stock from being voted "For" management's stock increase proposal by brokers who have no financial stake in Union, or in preemptive subscription rights issued by it, and who, along with their beneficial owners, are kept in complete ignorance by management of petitioners' objections to management's stock increase proposal because it made no provision for preemptive subscription rights.

This court has held that such preemptive subscription rights are "axiomatic in American corporation law". **Miles v. Safe Deposit & Trust Co. (1922), 259 U. S. 247, 252.** Under **Hayes v. St. Louis Union Trust Co. (1927), 317 Mo. 1028, 298 S. W. 91, 98,** the right is of "paramount importance" when the stock is voting stock, as here, and, **l. c. 97,** can be a "valuable right", depending on the subscription price. The court below did not think much of the importance, or worth, of such rights.

In its Findings and Opinion (Appendix A-3) the SEC approved management's use of unchecked proxies on the basis of its Rule X-14A-4 (b), which provides:

> "A proxy may confer discretionary authority with respect to matters as to which a choice is not so specified provided the form of proxy states in bold face type how it is intended to vote the shares represented by the proxy in each such case."

The court below found that petitioners had failed to demonstrate that that Rule, as applied in this case, did "not afford fair opportunity for the operation of corporate sufferage, within the presumable intelligence of ordinary stockholders."

The demonstration is mathematical. Item 9, Doc. 1, Ex. 3-b shows that at the 1957 stockholders' meeting unchecked proxies were not used in voting on petitioners' Proposal 2, which was a proposed By-Law requiring the approval of Union's Board before any company money could be spent for lobbying (Item 9, Doc. 1, Ex. 2, p. 1). The vote was 1,443,051 "For" to 1,516,239 "Against." Percentage-wise, Proposal 2 received more than 48% of the vote. At the 1958 meeting, where unchecked proxies were voted "Against" the same Proposal 2, the score was 328,285 "For" to 8,226,777 "Against" (Item 24). Proposal 2 received only 3.8% of the vote. Same proposal, same stock-

holders, same presumable intelligence, but a very wide disparity in result.

Petitioners attribute the lower court's finding that Rule X-14A-4 (b) is not in conflict with Sec. 20 (a) of the Holding Company Act (which limits the SEC's power to promulgate rules to those that are in the interest of the public or for the protection of investors or consumers) to an over-generous presumption respecting the intelligence of Union's ordinary stockholders. Union's ordinary stockholders should not be presumed to be in favor of undisclosed, secret lobbying, in view of the repatation their company has in that connection. But they may be presumbed to be susceptible to the "legal expertise in sleight-of-hand" which the court in **Halsted v. SEC (C. A. D. C. 1950), 182 F. 2d 660, 663**, stated "was not unknown in the utility holding company field." Union's management has been feeding them with deceptive advertising and deceptive stockholder communications for a long while.

The "legal expertise in sleight-of-hand" employed by Union's management here, as sanctioned by the SEC and approved by the court below, is out of line with **R. S. Mo. 1949, Sec. 351.245 (4)** (Appendix A-2). Under that statute only those proxies "executed in writing by the shareholder or his duly authorized attorney in fact" may be voted. "Executed" as used there means more than signed. The shareholder must affirmatively bestow, "in writing by the shareholder," the authority conferred. Negative authority, conferred other than "in writing by the shareholder," does not suffice.

The lower court held that the stockholder could write-in or strike-out the discretionary language printed on the proxy, and that that made it perfectly fair. Under Missouri law it is the other way around. The stockholder must himself write in something, or strike out something, or check a discretionary voting box, to confer discretionary authority.

Besides, as pointed out in the petition for rehearing (Item 22, p. 3), Rule X-14A-4 (a) (3) requires all proxy forms to present each matter to be acted on "impartially . . . , whether proposed by the management or by security holders." To require a writing-in or striking-out to prevent a negative vote on stockholder proposals, but not on management's proposal, is scarcely an impartial requirement. Since 59.5% of the vote here was cast via unchecked proxies the extent of the usurpation of authority by management's proxy agents is clear. Mr. McAfee was the leading proxy agent, in 1957 as well as 1958 (Item 9, Doc. 1, Ex. 3-b and Ex. 1-b).

In its Findings and Opinion the SEC interpreted its Rule X-14A-4 (c) as permitting management's proxy agents to vote against petitioners' seven proposals referred to in the notice of meeting (Item 9, Doc. 5, Ex. 1-a), even though the proxy form itself (Item 9, Doc. 5, Ex. 1-b) said nothing about that. The Rule states that "a proxy" may confer that discretionary authority respecting floor proposals unknown at the time the proxy material is sent out, but the Rule does not sanction usurpation of that authority by proxy agents who know what those proposals are, they being referred to in the notice of meeting. To recite that authority in the proxy statement does not suffice. The stockholder does not sign and return that.

Besides, under **R. S. Mo. 1949, Sec. 351.245 (4)** (Appendix A-2) the proxy bestowed authority, whatever it is, must be "executed in writing by the shareholder or by his duly authorized attorney in fact." The proxy agent may not unauthorizedly vote against proposals known to him at the time he solicits the proxies, since referred to in the notice of meeting, when they are presented at the meeting. Yet that is exactly what management's proxy agents, led by Mr. McAfee, did at the 1957 meeting, where all of peti-

tioners' unlisted proposals were defeated "by over 98% of the votes cast thereon" (Item 9, Doc. 5, Ex. 1-a, p. 8). They did it again, when again led by Mr. McAfee at the 1958 meeting, with the same result (Item 24). Only those stockholders personally present at either meeting were afforded opportunity to vote on petitioners' proposals referred to in the notice of meeting but excluded from the proxy statement and proxy ballot by order of the SEC. The SEC had ruled that those proposals referred to only in the notice of meeting could not be voted on via management's proxy form. It had excluded them under Rule X-14A-8 (c) (1) or (5). Yet management's proxy agents, led by Mr. McAfee, voted against them, via management's proxy forms, in 1957 and 1958, and Commissioners Orrick, Patterson, Hastings and Sargent countenanced that.

Chairman Gadsby was not a member of the SEC when the 1957 order was entered, and did not attend the oral argument before the SEC in the instant case (Item 9, Doc. 36, p. 5). Of course he may have read the transcript of the oral argument, as Commissioner Orrick assured petitioners Chairman Gadsby would. Chairman Gadsby participated in issuing the two orders on review below (Appendix A-4 and 5) and his name is affixed at the foot of the SEC's Findings and Opinion (Appendix A-3). If he did not read the transcript of the oral argument (and there is nothing in the record to show he did) it is believed that the decision of this court in **Morgan v. U. S. (1936), 298 U. S. 468,** is applicable as is likewise **WIBC, Inc. v. FCC (C. A. D. C. 1958), 259 F. 2d 941.**

The court below did not rule specifically on either of these points. It considered them based on too thin soil to merit or warrant prolongation of its opinion. So it only generally affirmed the SEC's interpretation of Rule X-14A-4 (c) and the "he who decides must hear" point.

One of the proposals kept off the proxy statement and proxy ballot, though referred to in the notice of meeting, was petitioners' proposed By-Law banning false advertising and false communications to stockholders and prohibiting the expenditure of any company money for either of those purposes (Item 9, Doc. 1, Ex. 2, p. 2, Proposal No. 5). The SEC found that this proposed By-Law should be excluded under Rule X-14A-8 (c) (5), since it consisted of a recommendation or request that management take action with respect to a matter relating to the conduct of the ordinary business operations of the company. The lower court affirmed. Under **R. S. Mo. 1949, Sec. 351.290** (Appendix A-2), Union's stockholders, not its management, have the power to make By-Laws for the purpose of regulating and managing Union's affairs. Under **R. S. Mo. 1949, Sec. 351.385 (11)** (Appendix A-2), By-Laws so made by the stockholders for the administration and regulation of the affairs of their corporation need conform only to Missouri law, not SEC Rules.

The lower court held that the exclusion was not devoid of rational basis. Under Missouri law there is not a scintilla of rationality in the exclusion.

REASONS FOR GRANTING THE WRIT.

1. Under Sec. 1 (a) of the Holding Company Act public utility holding companies are "affected with a national public interest". Hence a director of such a company who seeks SEC approval of proxy material furthering his candidacy for re-election, like applicants for patents, television channels, airmail routes and other monopolistic awards, must have clean hands if he is to be given that which he asks. His qualification, if challenged, is always an issue, and his disqualifying attributes, so long as connected with his application, are never too remote. That is the law as declared by the court below in **American Ins. Co. v.**

Scheufler (C. A. 8, 1942), 129 F. 2d 143, and in **Frank Adam Elec. Co. v. Westinghouse Elec. & Mfg. Co. (C. A. 8, 1945), 146 F. 2d 165.** It is the law as declared by this court in **Hazel-Atlas Glass Co. v. Hartford-Empire Co. (1944), 322 U. S. 238**, and it is the law throughout the land. Three recent cases are **Hall v. Wright (C. A. 9, 1957), 240 F. 2d 787; The Diversey Corp. v. Charles Pfizer & Co. (C. A. 7, 1958), 255 F. 2d 60**, and **Bishop v. Bishop (C. A. 3, 1958), 257 F. 2d 495.**

Nor may members of a quasi-judicial governmental agency who are authorized to bestow such governmental favors, and who do so, be biased or prejudiced or guided by favor in their grant thereof. **WKAT, Inc., v. FCC (C. A. D. C. 1958), 258 F. 2d 418.**

The forum in which to try out the disqualification questions here presented is the SEC. The decision of the court below affirming the SEC finding that it was not the proper forum is believed to be irreconcilable with **Precision Instrument Mfg. Co. v. Automotive M. M. Co. (1945), 324 U. S. 806; Keystone Driller Co. v. General Excavator Co. (1933), 290 U. S. 240; FCC v. WOKO, Inc. (1946), 329 U. S. 223; WKAT, Inc., v. FCC (C. A. D. C. 1958), 258 F. 2d 418; Root Refining Co. v. Universal Oil Products Co. (C. A. 3, 1948), 169 F. 2d 514; Trans World Airlines, Inc., v. CAB (C. A. D. C. 1958), 254 F. 2d 90; Mas v. Coca-Cola Co. (C. A. 4, 1947), 163 F. 2d 505; Berkshire Employees Ass'n v. NLRB (C. A. 3, 1941), 121 F. 2d 235**; and **Massachusetts Bay Telecasters, Inc., v. FCC (C. A. D. C. 1958), 261 F. 2d 55.**

2. Unless factual basis is shown, or legal reasons assigned, administrative findings and opinions are invalid. The court below, which declared itself in **Pet Milk Co. v. Boland (C. A. 8, 1949), 175 F. 2d 151**, to be a court of review and not a court of re-trial, could not properly, in reviewing the orders complained of here, assign its own

reasoning, whether good or bad, in purported validation of the SEC's assumption of jurisdiction respecting certain portions of Union's proxy material, when the SEC itself assigned no factual basis or legal reason for that assumption at all.

Yet the court below did just that. In that respect its decision is believed to be irreconcilable with **SEC v. Chenery Corp. (1943), 318 U. S. 80; Public Service Corp. of N. J. v. SEC (C. A. 3, 1942), 129 F. 2d 899; Swift & Co. v. NLRB (C. A. 10, 1939), 106 F. 2d 87;** and **Saginaw Broadcasting Co. v. FCC (C. A. D. C. 1938), 96 F. 2d 554.**

3. Sec. 24 (a) of the Holding Company Act bestows exclusive jurisdiction on the reviewing court to affirm SEC orders before it for review. Sec. 24 (b) of that Act simply provides that the commencement of such review proceedings does not operate as a stay of the order unless such stay is specifically granted. That does not mean that the denial of stay operates as a prejudgment of the invalidity of the order on review, or even as a prima facie finding of invalidity. The grant or denial of a stay does not constitute an adjudication on the merits, one way or the other, and can in no way affect the "exclusive jurisdiction" provision of Sec. 24 (a) of the Act. The jurisdictional provision of Sec. 24 (a) is not nullified by the denial of a stay sought under Sec. 24 (b). If it were, stays would never be sought.

The decision of the court below that its denial of stay in Case No. 15,765 (then pending before this court and now pending before the court below) allowed the SEC order in that 1957 case to have "legal operation", despite the pendency of proceedings for review thereof, greatly extended the significance of stay denial formerly obtaining in the court below under its decisions in **Benson Hotel Corp. v. Woods (C. A. 8, 1948), 168 F. 2d 694,** and **Pratt v. Stout (C. A. 8. 1936), 85 F. 2d 172.**

The decision of the court below that its denial of stay in Case No. 15,765 sanctioned the SEC's assumption of jurisdiction over its 1957 order, and permitted it to base valid and proper administrative action herein on that assumption, is believed to be irreconcilable with **Virginian Ry. Co. v. U. S. (1926), 272 U. S. 658; Yakus v. U. S. (1944), 321 U. S. 414; Ohio Oil Co. v. Conway (1929), 279 U. S. 813;** and **Breswick & Co. v. U. S. (1955), 75 S. Ct. 912.**

4. When the court below affirmed generally the SEC's exclusion from management's proxy material of Petitioners' Exhibit 12 (Item 9, Doc. 43) it affirmed generally an SEC exclusion for which the SEC itself assigned no reason, either factual or legal, other than that it had considered petitioners' objection to the exclusion and found it "without merit". Aside from the illegality of that under the authorities cited in Reason 2 hereinabove, the effect of that general affirmation by the court below was to exclude from its specific consideration the very document which formed the factual basis of petitioners' contention that the SEC lacked jurisdiction over all questions dependent on the validity of the 1957 order, by reason of the pendency of the review proceedings respecting that order and the "exclusive jurisdiction" provision of Sec. 24 (a) of the Holding Company Act.

There is no substantial evidence, nor even a scintilla of evidence, in the record certified by the SEC to the court below (Item 9, Docs. 9 and 10) that the 1957 order featuring in Case No. 15,765 was not on review. The only evidence on that point in that record is Petitioners' Exhibit 12 (Item 9, Doc. 43), which was admitted in evidence and which shows that that 1957 order was on review. Indeed, Case No. 15,765 having been remanded by this court to the court below, and there pending, that 1957 order of the SEC is still on review.

In denying the stay in Case No. 15,765 the court below did not base its denial on any finding that the petition for

review was frivolous. The SEC's motion alleging it frivolous was never ruled on and is still pending. In denying the stay the court did not, then or ever, pass on the merits of that case at all. Instead it subsequently held it moot. If it had passed on the merits, even preliminarily (though it did not have the record before it at the time, or even the SEC's Findings and Opinion), under **WIBC, Inc., v. FCC (C. A. D. C. 1958), 259 F. 2d 941,** it could only have held the order on review invalid. Oral argument before the SEC, though requested by petitioners, was denied in Case No. 15,765 (Item 9, Doc. 23, p. 1).

Hence, by excluding from its specific consideration the very factual basis which petitioners offered in support of their contention of the SEC's lack of jurisdiction respecting its 1957 order (which was the only evidence in the case that that 1957 order was on review), and by holding that the denial of stay of that order operated to give the SEC jurisdiction to consider it valid, the court below departed from the well reasoned dissent of Mr. Justice Frankfurter and Mr. Justice Murphy in **In re Electric Power & Light Corp. (1949), 337 U. S. 903.** The question of whether or not that dissent should now be declared the law is believed to be of sufficient importance to warrant review of this case by this court.

5. On the question of the exclusion from management's proxy material of petitioners' Statement in Opposition to management's proposal to increase the authorized common stock by 1,500,000 shares without affording Union's common stockholders opportunity to regain, unrestricted, their preemptive subscription rights, the decision of the court below affirming that exclusion conflicts with the requirement of full disclosure announced in **SEC v. May (C. A. 2, 1956), 229 F. 2d 123;** in **SEC v. Okin (C. A. 2, 1943), 132 F. 2d 784;** in **General Foundry Co. v. Gondelman (S. D. N. Y. 1958), 166 F. Supp. 429;** and in **SEC v. Okin (S. D.**

N. Y. 1944), 58 F. Supp. 20. It also conflicts with the well reasoned decision of a District Court in the Sixth Circuit, **Berkwitz v. Humphrey (N. D. Ohio 1958), 163 F. Supp. 78,** and SEC Proxy rule X-14A-9 as interpreted in the Note in **46 Mich. L. R. 1111.**

6. The interpretation accorded New York Stock Exchange Rules 450, 451 and 452 by the court below is so plainly discriminatory that it should not be allowed to stand. A proper interpretation of those Rules is vitally important to the confidence of the nation in that Exchange.

In that respect, unless the decision of the court below is reversed it is bound to operate in derogation of that confidence, since it is precedential. The interpretation is completely oligarchical, and in conflict with **SEC v. Transamerica Corp. (C. A. 3, 1947), 163 F. 2d 511.** Public utilities are run for the benefit of their consumers and stockholders, not brokers and management. Indeed, the proxy material of public utility holding companies such as Union should be subjected to special scrutiny. In that respect the decision of the court below is believed to be in conflict with **Halsted v. SEC (C. A. D. C. 1950). 182 F. 2d 660.**

7. The decision of the court below affirming the validity and applicability of SEC Proxy Rule X-14A-4(b) here, and affirming the SEC's interpretation and applicability of its Proxy Rule X-14A-4(c) here, unless reversed will adversely affect stockholders in all companies subject to SEC jurisdiction, of which stockholders there are some 9,000,000, scattered all over the world. The question of whether state statutes or SEC Proxy Rules govern in proxy matters has never been decided by this court. Certiorari was denied in **SEC v. Transamerica Corp. (1948), 332 U. S. 847.**

8. The decision of the court below affirming the exclusion from management's proxy material of petitioners' proposed By-Law banning false advertising and false com-

munications to stockholders violates Missouri law and is believed to be in conflict with **SEC v. Transamerica Corp. (C. A. 3, 1947), 163 F. 2d 511.** It undermines that monument to corporate democracy, ignores the philosophy of Congress when it enacted the several acts dealing with corporate securities, and resurrects an attitude toward corporate deception that has long since been buried and should be reinterred.

9. This case is the second of a trilogy brought by petitioners to review SEC orders permitting the proxy material of Union's management to become effective. The first, on remand from this court, is pending below. So is the third (Item 25). A decision herein by this court will settle all three. Otherwise petitioner Nancy Corinne Dyer, who believes in stockholder responsibility, will continue what the court below characterized as her "crusade". In Missouri, regular stockholders' meetings come up every year under **R. S. Mo. 1949, Sec. 351.225 (2).** Union's By-Laws (Item 9, Doc. 40) provide for annual meetings.

10. The decision of the court below, being couched in the language it is, can only operate to discourage stockholders from seeking judicial review of SEC orders respecting proxy material by which they consider themselves aggrieved. In that respect the decision below is in conflict with **In re Engineers Public Service Co. (C. A. 3, 1955), 221 F. 2d 708,** wherein the court declared that it was the intent of Congress, when it enacted the Holding Company Act, to encourage adversary proceedings thereunder, both before the courts and before the SEC.

11. This case has national interest, and is of vital importance to the SEC and to Union. The integrity of four SEC Commissioners, and the integrity of the president of Union, a great public utility owned by some 60,000 stockholders and serving some 650,000 consumers in three

states, are involved. Perjury is charged, and the shielding of perjury, and fraud in high places stands exposed.

The lower court held that there was not the slightest basis in the record for such charges, and that the SEC was entitled to have that cloud lifted. This court is the only court that can lift it with finality. If it does not grant the writ petitioners pray petitioner Nancy Corinne Dyer intends to continue making those charges, as is not only her right but her duty under the **Precision Instrument** decision of this court cited in Reason 1, **l. c. 818.**

This case is of vital importance to petitioner J. Raymond Dyer, too. The SEC, in **SEC v. Dyer (E. D. Mo. 1958), 22 F. R. D. 229,** charged him with "wilfull and deliberate" violation of one of its orders when he sent out to the stockholders, in refutation of the March 29, 1957 letter libeling him which Mr. McAfee had proposed to the SEC, and which the SEC had approved, his own March 29, 1957 postcard stating that petitioners had instituted review proceedings respecting that libel-sanctioning order of the SEC, and that he thought truth would prevail. He did that in reliance on "Lumbard's Law", announced by that greatly respected Circuit Judge in the Second Circuit in **SEC v. May (S. D. N. Y. 1955), 134 F. Supp. 247, 257, aff'd (C. A. 2, 1956), 229 F. 2d 123.**

SEC v. Dyer was held moot on July 28, 1958, in reliance on the decision of the court below that was on May 18, 1959 vacated by this court. Defendant's motion for a new trial has all that while been pending. However, under date of July 24, 1959 the District Court advised the SEC that on the basis of the "teachings and apparent mandate" of the decision of the court below herein it was going to grant defendant's motion for a new trial; dispense with the actualities of that; vacate its mootness judgment; and enter judgment for the SEC and against defendant. The

clean hands doctrine of "Lumbard's Law" apparently does not obtain in the Eighth Circuit.

Thus, **SEC v. Dyer** is tied to this case, at least in the mind of the District Court before which it is pending. Hence, by reason of the decision of the court below herein petitioner J. Raymond Dyer, a member in good standing of the bar of this court since December 11, 1930, is enveloped in an ominous cloud. He, too, is entitled to have that cloud lifted. Appeal to the U. S. Court of Appeals for the Eighth Circuit will not lift it. Only this court, by granting certiorari herein, can lift it.

CONCLUSION.

For the foregoing reasons this petition should be granted. When granted, petitioners pray that the hearing before this court be held on the record as submitted herewith, without need to print, to the end that the judgment below be vacated and this case be remanded to the court below with appropriate instructions, including instructions to remand it to the SEC with directions similar to those given by the court in **WKAT, Inc. v. FCC (C. A. D. C. 1958), 258 F. 2d 418.**

Respectfully submitted,

J. RAYMOND DYER,
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July 31, 1959.